72-812

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1972

No.

THOMAS TONE STORER, et al., *Appellants,*

vs.

EDMUND G. BROWN, JR., et al., *Appellees.*

GUS HALL, et al., *Appellants,*

vs.

EDMUND G. BROWN, JR., *Appellee.*

On Appeal from the United States District Court for the Northern District of California

JURISDICTIONAL STATEMENT

PAUL N. HALVONIK,
FRIEDMAN, SLOAN & HALVONIK,
680 Beach Street, Suite 436,
San Francisco, California 94109,
Attorney for Appellants Storer, et al.

CHARLES C. MARSON,
JOSEPH REMCHO,
PETER E. SHEEHAN,
American Civil Liberties Union Foundation of Northern California, Inc.,
593 Market Street, Suite 227,
San Francisco, California 94105,
Attorneys for Appellants Hall, et al.

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Appellants appeal from the judgment of the United States District Court for the Northern District of California, entered on September 8, 1972, denying appellants injunctive and declaratory relief and granting appellees' motions to dismiss.

OPINION BELOW

The opinion of the District Court for the Northern District of California is as yet unreported. A copy of that opinion and order is attached hereto as Appendix A.

JURISDICTION

The jurisdiction of the court below was invoked pursuant to 42 U.S.C. §§1981, 1983, 1985(3) and 1988; 28 U.S.C. §§1331(a), 1343(4), 1357, 2201, 2202, 2281, and 2284; Article I, §2, Clause 2, of the United States Constitution; and the First and Fourteenth Amendments to the United States Constitution. The judgment of the court below was entered on September 8, 1972, and notice of appeal was filed in that court on September 13, 1972. An order extending the time in which to file appellants' jurisdictional statement to and including December 4, 1972, was filed by Mr. Justice Douglas on November 13, 1972. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1253.

QUESTIONS PRESENTED

1. Whether California Elections Code §§6830(c) and 6830(d) which, singly or in combination operate to deny appellants their right to appear on the ballot, to nominate persons of their choice for the ballot and to vote for persons of their choice, violate the First and Fourteenth Amendments because they condition access to the ballot on unreasonable conditions supported by no legitimate state interest.

2. Whether California Elections Code §§6830(c) and 6830(d) further violate Article I, §2, Clause 2, of the United States Constitution by adding qualifications for the office of U.S. Congressman.

3. Whether California Elections Code §§6830(c), 6830(d), 6833, 6864 and 6831, which, singly or in combined effect, make it impossible for an independent candidate to secure a place on the ballot, violate the First and Fourteenth Amendments by denying appellants due process and the equal protection of the law in the fundamental protected area of the right to vote and run for office.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, First Amendment:

> "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Constitution of the United States, Fourteenth Amendment, due process and equal protection clauses:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the United States, Article I, §2, Clause 2:

"No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen."

California Elections Code, §§6830, 6831, 6833, 6864, 6430 and 6082, all of which are fully set forth in Appendix B.

STATEMENT

Thomas Tone Storer was a candidate for the United States Congress in California's Sixth Congressional District. He was an independent who wished to appear on the November 7, 1972 general election ballot and be so designated.

Storer is an attorney at law who has been politically active in California's Marin County for a number of years. In November of 1964 he was elected to the Board of Supervisors of Marin County; he defeated an incumbent in a run-off election. In 1966 he won the Democratic nomination for United States Congressman in the First Congressional District (which then included Marin County) but was defeated by the incumbent Congressman at the general election. In 1968 Storer sought re-election to the Board of Supervisors and was narrowly defeated.

Storer, for most of his political life, has been affiliated with the Democratic Party. In the past few years, however, he has been distressed at the quality

of political leadership in the United States and has concluded that the situation will not improve as long as the Democratic and Republican parties, which he feels are excessively controlled by money interests, dominate the country's political life to the exclusion of independent voices. Storer made his disaffection with the Democratic Party formal by changing his registration from "Democrat" to "Decline to State" (i.e., under California law, "Independent") in January of 1972.

Gus Hall and Jarvis Tyner are members of the Communist Party of the United States. They were candidates for the offices of President and Vice-President, respectively, of the United States in the November 7, 1972 election. They desired to run as independent candidates for those offices in the State of California and to be so designated on the election ballot. They collected and properly filed 25,000 nomination signatures, well in excess of the 18,000 required for recognized parties to place a candidate on the Presidential ballot in California.

All of the appellant-candidates were ready, willing, and able to tender the required filing fee and to meet any other reasonable requirements for positions on the ballot in California as independent candidates. Appellees refused to place their names on the ballot, relying on the following provisions of California law:

A. California Elections Code §§6833, 6864, 6830 and 6831 which, in combined effect, make it virtually impossible for anyone to qualify as an independent candidate on a November election ballot:

1) §6831 prohibited appellants' names from appearing on the ballot unless they had acquired the signatures of not less than 5% nor more than 6% of the entire vote cast in the preceding general election.

2) §§6833 and 6864 gave appellants but 24 days in which to acquire those signatures. They were not permitted to circulate nomination petitions for voters' signatures before August 15, 1972, and would have had to acquire the requisite number of valid signatures by September 8, 1972.

3) California Elections Code §6830(c) provides that no person could validly sign appellant-candidates nomination papers who had voted in the primary election of June 6, 1972.

By contrast, a partisan candidate for Congress may appear on a primary ballot with no more than 40 signatures of sponsors and persons are not prohibited from signing his nominating papers by virtue of their participation in any elections. A partisan candidate for President or Vice President may appear on the primary ballot with no more than 18,000 signatures of sponsors and, likewise, they are not excluded by virtue of their participation in any elections.

B. California Elections Code §6830(d) prohibits any person who has been registered as affiliated with a political party at any time after June 6, 1971, from appearing on the ballot as an independent candidate. Storer had been registered as affiliated with the Democratic Party until January of 1972.

C. California Elections Code §6830(c) prohibits anyone who has voted "at the immediately preceding

primary election at which a candidate was nominated for the office mentioned in the nomination paper" from running as an independent candidate for Congress. Storer voted in the primary election of June 6, 1972, in order to exercise his franchise on non-partisan matters; but because nominees for the office of United States Representative from the Sixth Congressional District were voted upon by partisan voters at that primary election, Storer's exercise of his right to the franchise resulted in his being unable to appear on the ballot as an independent Congressional candidate.

The three appellant-candidates in these suits are joined by registered voters who wished to sign nomination papers but were foreclosed, by California law, from doing so.

These appellants were foreclosed from signing nomination papers for an independent candidate because they had voted in the Democratic Primary of June 6, 1972. They were foreclosed from signing the nomination papers even though they signed no nomination papers for any other candidate for the respective offices in the primary election of June 6, 1972, or for the general election of November 7, 1972. Indeed, two of these appellants, Johnson and Soladay, while voting in the Democratic Party Primary, did not cast votes for either of the candidates for the Democratic nomination for Congressman of the Sixth Congressional District.

Storer and his co-appellants filed their suit on May 30, 1972, contending that the California scheme regulating the appearance of independent candidates on

the ballot violated the following fundamental Constitutional rights:

a) The right to seek and hold office;

b) The right to equal protection of the laws;

c) The right to due process of law;

d) The right freely to express views and effectively participate in the political processes of the United States and California as guaranteed by the First Amendment to the United States Constitution.

And they contended, further, that California Elections Code §6830(d), by absolutely prohibiting Storer from appearing on the ballot because he had, within the past year, been affiliated with the Democratic Party, and California Elections Code §6830(c), by absolutely prohibiting Storer from appearing on the ballot as a candidate for United States Representative because he voted in the primary election of June 6, 1972, unconstitutionally added to the qualifications for Representative in the United States Congress in violation of Article 1, §2, Clause 2 of the United States Constitution.

In their prayer, appellants sought a declaration that the challenged sections of the California Elections Code are unconstitutional and an injunction providing that, upon Storer's tendering of the statutory filing fee and the presentation by him of a nomination petition signed by at least 40 electors qualified to vote in the Sixth Congressional District, defendants be required to certify Storer as a candi-

date for United States Representative in the Sixth Congressional District and defendants be required to place his name on the ballot.

On August 11, 1972, Hall and his co-plaintiffs filed suit attacking Elections Code §§6830(c), 6831, 6833, and 6864 on the same grounds as Storer, but as they applied to Presidential candidacies. Three-judge courts, identical in composition, were convened to hear both suits. The District Court heard argument in *Storer* on August 31, 1972, and at the Court's suggestion, counsel for *Hall* stipulated that their case would be submitted on the briefs and the *Storer* argument.

The judgment of the Court below, denying, on the merits, the relief prayed for by appellants was filed on September 8, 1972. See Appendix A. The Notice of Appeal was filed on September 13, 1972.

On September 14, 1972, appellants applied to Mr. Justice Douglas for an injunction. The relief for which they prayed, pending disposition of this case on appeal, was the placing of their names on California's general election ballot of November 7, 1972. Oral argument before Mr. Justice Douglas was heard on September 15, 1972, in Gooseprairie, Washington. Mr. Justice Douglas denied appellants' Application for Injunctive Relief on that same date.

THE QUESTIONS ARE SUBSTANTIAL

California has made it virtually impossible for anyone to appear on its general election ballot as an independent candidate for federal office. Indeed, no one

has ever been able to satisfy the statutory requirements for independent candidacy.

Whether a state has the power to require candidates for political office, particularly federal political office, to affiliate with a recognized political party as the price for appearance on the ballot is about as substantial a question as one might imagine.

A. THE IMPOSSIBILITY OF SATISFYING CALIFORNIA'S STATUTORY SCHEME FOR INDEPENDENT CANDIDACY

California requires appellant-candidates to obtain 5% of the electorate's signatures in order to qualify for the ballot. That requirement, standing alone, might not be thought an unreasonable regulation of access to the ballot. See *Jackson v. Ogilvie,* 325 F.Supp. 864 (N.D.Ill. 1970) (three-judge court), *aff'd* mem. 403 U.S. 925 (1971). But California Elections Code §6831, when read together with §6830(c), does not simply require appellants to obtain the signatures of 5% of the registered voters. By virtue of §6830(c)'s exclusion from the group of potential signers those who have voted in the primary, §6831 limits the number of voters who could sign appellants' ballot petitions to approximately 30% of registered voters. By requiring appellants to obtain the signatures of 5% of this limited electorate, California, in effect, places on appellants a burden greater than a requirement that they produce the signatures of 20% of the registered voters in the district (in the case of Storer), or throughout the state (in the case of Hall). And this

immense number of signatures must be gleaned from a small portion of the general public, unidentifiable by any physical or geographical traits, which is composed of those persons least interested in the electoral process (those who did not even bother to vote at the primary election). And all of this must be done in a period of 24 days during that period in the latter part of August when residents are most likely to be away on vacation.

This immense burden, greater in magnitude than the 15% requirement struck down in *Williams v. Rhodes,* 392 U.S. 23 (1968), should be struck down on the authority of *Williams* alone. But it also has some additional infirmities.

In the first place, California Elections Code §6830 (c), by prohibiting those who have voted in the preceding primary election from signing nomination papers of an independent candidate, unconstitutionally conditions the exercise of a fundamental right on the relinquishment of another fundamental right. Co-appellants of the appellant-candidates are prohibited from signing the petitions of an independent candidate because, and solely because, they exercised their right to vote. They had no control over the names of the candidates who appeared on their primary ballot, they signed no nominating petitions for candidates appearing in the primaries, and Storer's co-appellants, Johnson and Soladay, did not even vote in the primary for either of the choices presented to them.

The state may not condition the exercise of one constitutional right (in this case the right effectively

to participate in the electoral process by signing the nomination papers of a candidate for office) on the abandonment of another constitutional right (in this case the right to vote in an election). See *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

Secondly, prohibiting those who have voted in the primary elections from signing the papers of an independent candidate, since it invidiously discriminates between groups of the electorate for no legitimate reason, violates the equal protection clause of the Fourteenth Amendment. Cf. *Kramer v. Union Free School District*, 395 U.S. 621 (1969).

Thirdly, even if §6830(c) prohibited, in the customary fashion, voters who signed the *nominating papers* of a partisan candidate from signing those of an independent candidate, it would still be constitutionally infirm because the statutory period for collecting signatures on partisan nominating papers *precedes* that of the period in which to acquire signatures on nominating papers of an independant candidate. Thus partisan candidates are given an unfair advantage, the opportunity to approach signators before independent candidates may even become formal candidates. The placing of such a special obstacle on independent candidates has been raised in two federal cases with which appellants are familiar. In both it was avoided by a statutory construction which left the independent candidate on essentially the same footing as partisan candidates. See *Moore v. Board*

of Elections for District of Columbia, 319 F.Supp. 437 (D.D.C. 1970); *Jackson v. Ogilvie, supra.* §6830(c), however, cannot be saved by statutory construction. It places a special obstacle on the independent candidate by removing from his group of nomination supporters some 70% of the electorate before the period in which he may gather his signatures even begins. Accordingly, §6830(c), individually and in combination with §§6831 and 6833, violates the First and Fourteenth Amendments to the United States Constitution.

Finally, the requirement that Appellants obtain all these signatures from such a limited, unidentifiable and elusive group within a twenty-four day period is simply preposterous. What conceivable purpose can it serve? None but to hector the candidate and insure that no one can ever satisfy the requirement. "The three-week requirement is suffocating and effectively blocks access to the ballot by all but the most disciplined of minority political organizations. It freezes the status quo and reduces the voters' choice to a bare minimum." *People's Party v. Tucker,* 347 F. Supp. 1, 4 (M.D. Penna. 1972) (three-judge court).[1]

To all of this the Court below replied that California has a legitimate interest in avoiding a "laundry list" ballot. Agreed. But that interest cannot be pursued in any manner that the not totally disinterested

[1]In *People's Party* the court struck down a provision requiring political bodies wishing their candidates to appear on the ballot to secure the signatures of 2% of the largest vote cast in the state at the last election in a three-week period.

Legislature chooses to adopt. Why is it that independents are deemed a clutter on the ballot and Democrats are not? Should the Democratically controlled Legislature conclude that the appearance of Republican names makes for an untidy ballot, can it ban that party's nominees? Hardly. If the legitimate interest in avoiding a "laundry list" ballot were a talismanic response to every attempt to avoid invidious electoral discrimination, then the petitioners in *Williams v. Rhodes, supra,* should have lost.

But they won.

They won because the state's concededly legitimate interest in keeping the size of the ballot manageable cannot be promoted in a manner which broadly stifles electoral liberty when there is available to the state an alternative means, less subversive of the fundamental right to vote, which can advance the state's cause while leaving the ballot as an effective tool for reflecting the will of the people. California can require that those seeking office as independents demonstrate significant community support. Appellants would not, as a constitutional matter, quarrel with a simple requirement that they obtain the signatures of 5% of the electorate within a reasonable amount of time and with the entire electorate composing the pool from which they must draw support. Appellants could easily comply with such a requirement. But that is not California's law. The California Legislature, composed of Democrats and Republicans, has fenced out of the elections all "spoilers" who might bring an air of uncertainty to elections in the "safe"

districts it has drawn. It has made it virtually impossible for anyone to qualify as an independent Congressional or Presidential candidate. And this California cannot do. The Constitution forbids it.

B. ELECTIONS CODE §6830(d) AND THE STATE INTEREST IN INHIBITING "PARTY HOPPING"

California prohibits anyone from appearing on the ballot as an independent candidate who has, within the 17-month period preceding the general election, been affiliated with a political party. §6830(d). Appellant Storer, because he had been registered as a Democrat until some ten months before the general election, was thus absolutely precluded from appearing on the general election ballot. This, the court below said, is a valid measure designed to inhibit "party hopping." But appellant Storer has not hopped among parties. He does not seek any political party's nomination.

True enough, some statutory provisions requiring candidates for office to be affiliated with a political party for a lengthy period before seeking that party's nomination have been upheld on the theory that the state is promoting party loyalty and discouraging a "raid" by one party on another. See, e.g., *Lippit v. Cipollone,* 337 F.Supp. 1405 (N.D. Ohio 1971) (three-judge court), *aff'd* ..... U.S. ....., 92 S.Ct. 729 (1972). But §6830(d) cannot be said to promote any such objectives. The state cannot argue that there is any

such thing as "independent" loyalty or that it has an interest in insisting that the disaffected, if they are to seek political office, must remain within the party which has engendered their disaffection.

It is one thing to maintain that the state has a legitimate interest in insuring that the nominees of a political party are loyal to that party's principles. It is quite another to maintain that the state has a legitimate interest in generally promoting political loyalty to partisan parties and has the power to withdraw political rights from those who would announce their independence of political parties. The state has as much business requiring us to belong to a political party as it would requiring us to attend church. If there is one thing that is unambiguously clear about the First Amendment it is that the state does not have the power to promote orthodoxies, be they political or otherwise. See *West Virginia Board of Education v. Barnette,* 319 U.S. 624, 642 (1943).

Far from being a "compelling interest" which overrides appellants' political rights, California's insistance upon loyalty to some political party as the price for candidacy promotes no legitimate interest at all but seeks to do precisely what the First Amendment prohibits.

Moreover, appellant Storer's attack on §6830(d) is not confined to First and Fourteenth Amendment rights. He also contends that §6830(d) provides an additional qualification for the office of Congress not contained in Article I, §2, Clause 2 of the United States Constitution. It has never been held, or to

appellants' knowledge even suggested, that the states may expand upon those qualifications for federal office contained in the United States Constitution on the plea that they have a "compelling interest" in doing so.

Although there is a manifest tension between the description of qualifications contained in Article I, §2 on the one hand, and, on the other, the provision of Article I, §4 giving the states the power to set the "times, places and manners" of holding elections (a tension which has created some conflict in decisions regarding Article I, §2), it is clear, nevertheless, that a simple requirement of status which prohibits a person from appearing on the ballot because he is a member of a class from which he cannot escape (i.e., people who have been affiliated with a political party in the preceding 17 months) is a "qualification" for office and not a "time, place or manner" of holding an election. See, e.g., *Dillon v. Fiorina,* 340 F.Supp. 729 (D.N.M. 1972) (three-judge court) (holding New Mexico provisions limiting candidates for a political party's Senatorial nomination to those who had been members of the party for a year, and residents of the state for an additional year, in conflict with Article I, §3's description of the qualifications of a candidate for United States Senate).

In short, §6830(d) of the California Elections Code violates the First and Fourteenth Amendments because it conditions access to the ballot on an unreasonable condition supported by no legitimate state interest and because it adds a qualification for office

in violation of Article I, §2, Clause 2 of the United States Constitution.[2]

C. THIS CASE IS NOT MOOT

The 1972 election is behind us but this case is not, as appellees will doubtless urge, moot. Election suits are not ripe until that period just before an election and by the time one is heard by a three-judge court the opportunity to bring a case before this Court before an election is usually gone. This Court, in *Moore v. Ogilvie,* 394 U.S. 814, 816 (1969), held that where election laws are challenged and the challenge raises questions which are "capable of repetition, yet evading review," the cause will not be deemed moot simply because the election has passed. Appellants sought, in addition to a place on the ballot, declarations of unconstitutionality and injunctions restraining

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[2]Appellants also challenge that portion of California's Elections Code §6830(c) which prohibits anyone who has voted "at the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper" from running as an independent candidate for Congress as a violation of Article I, §2. Storer voted in the primary for the reason that, in California, independents, as well as those who are registered with a political party, may vote in the primary. Independents vote for non-partisan offices and on ballot propositions. See California Elections Code §§10290, 10291, 10298 and 10318. Prohibiting Storer from running for Congress simply because he had voted in a non-partisan primary would obviously be unconstitutional. In the Court below, the Attorney General took the position that §6830(c) should be interpreted to exclude from the ballot only those who had voted on a partisan ballot, as distinguished from a non-partisan ballot, at the primary election. §6830(c), however, does not make the distinction urged by the Attorney General. If the Attorney General's construction were adopted it would satisfy appellant's objection, but the Court below declined to give appellants declaratory relief even on the question of the meaning of §6830(c).

enforcement of California's election scheme for independent candidacy. Appellants are still entitled to answers to the questions they have raised.

CONCLUSION

The latest public opinion polls report a dramatic decline in the people's trust of government—a decline that is all the more disturbing in an election year when the voters had an opportunity to register their disapproval by electing new officials.

But the electoral choices did not seem attractive to large numbers of citizens. To them the political air was stagnant and the dialogue pointless. In California, new registrants are declining to affiliate with any political party in unprecedented numbers. In some counties the number of new registrants who identify themselves as independents exceeds the number of new Republican registrants and threatens the Democrats.

Surely these people have a right to run for office and just as surely they have the right to choose from among candidates other than those designated by the political parties with which they refuse to affiliate.

It was not the intent of the Framers to limit the electorate's choice to Democrats and Republicans, there being no Democrats or Republicans at the time the Constitution was adopted. They envisioned an open society, free of governmentally imposd political orthodoxy, in which the ballot would be a mirror

genuinely reflecting the will of the people. California's election laws are not consistent with that vision; they affront it and work to blur it.

The questions presented by this appeal are, appellants respectfully urge, substantial ones of significant public importance.

Dated, San Francisco, California,
December 4, 1972.

Respectfully submitted,

PAUL N. HALVONIK,
FRIEDMAN, SLOAN & HALVONIK,
Attorney for Appellants
Storer, et al.
CHARLES C. MARSON,
JOSEPH REMCHO,
PETER E. SHEEHAN,
American Civil Liberties Union Foundation
of Northern California, Inc.,
Attorneys for Appellants
Hall, et al.

(Appendices Follow)

Appendix A

In The United States District Court For The Northern District Of California

Thomas T. Storer, et al., Plaintiffs, vs. Edmund G. Brown, Jr. et al., Defendants.	C-72-978
Gus Hall, et al., Plaintiffs, vs. Edmund G. Brown, Jr., et al., Defendants.	C-72-1468

[Filed September 8, 1972]

OPINION AND ORDER

The above cases, though not identical as to parties and presenting slightly different contentions, or the same contentions in slightly different contexts, present, in the view of the Court, substantially the same ultimate issues and require only a single opinion.[1]

[1] *Storer*, in which plaintiffs are potential candidates for the office of Representative in Congress and certain of their alleged supporters, was commenced first, had passed through the stages of designation of a three-judge District Court pursuant to 28 U.S.C. §2284 and plaintiff's motion for a preliminary injunction and defendants' motion to dismiss were set for hearing when *Hall* was filed on behalf of a potential candidate for President of the United States. By appropriate orders and stipulations, although the cases were never consolidated, the parties to *Hall* will be bound by the

Both cases turn in the final analysis on the Constitutionality of Division 5, Chapter 3, comprising §§6800 through 6290, of the California Elections Code, providing a procedure for so-called Independent nominations by which a candidate for any public office not nominated in the party primaries may obtain a place on the ballot as an Independent candidate. Plaintiff Storer and plaintiff-intervenor Frommhagen, not having been nominated in their party primaries as candidates for Representative in Congress for their respective districts and plaintiff Hall, not having been nominated in the presidential primary for President of the United States, allege that they wish to appear as candidates for such offices as Independent, but are effectively barred from doing so by various provisions of the statutes referred to above, especially §§6830(c) and (d) (which disqualify persons who voted at the immediately preceding primary election from being either candidates or signers of a candidate's nomination papers for Independent status and also disqualify a person registered as a party member for one year preceding the immediately preceding primary from being a candidate in an Independent capacity); 6831 (requiring the signatures on nomination papers for Independent candidates of 5 to 6% of the entire vote in the district in the preceding general election—alleged to require some 9,500 signa-

rulings made in *Storer* which are common to both cases and any separate issues in *Hall* stand submitted without further briefing or oral argument. The view taken by the Court herein is such that there are no separate issues in *Hall* and the rulings expressed are dispositive of both cases. Unless otherwise indicated, all statutory references are to the California Elections Code.

tures in the district Storer seeks to represent and state on an exhibit to the complaint in intervention to require some 7,500 signatures in the case of Frommhagen) and 6833 (allowing only 24 days within which to prepare, file and lodge Independent nomination papers). Storer alleges that he is over the Constitutionally required age of 25, is a registered voter, presently unaffiliated with any political party, though previously a registered Democrat for many years prior to January, 1972 when he switched his registration to "Decline to State." He intends, however, as the law allows, to vote in the June 6, 1972 primary on non-partisan matters (The complaint, filed in May, 1972, necessarily limits the plaintiffs to a statement of their intentions with respect thereto.) Johnson intends likewise to vote on non-partisan matters but not to vote for a Democratic candidate for Representative in Congress. Fracchia and Drath intend to vote on all matters they are entitled to by virtue of their Democratic registration, including nomination of a Representative in Congress. All the four plaintiffs mentioned above, however, desire to sign Independent nomination papers for Storer.

As the foregoing summary of the relevant statutes shows, Storer will be barred from Independent candidacy by §6830(c) if he carried out his stated intention of voting on nonpartisan matters in the June primary and by §6830(c) and (d) by virtue of his prior Democratic registration, and all plaintiffs mentioned above will be barred from signing Storer's nomination papers by §6830(c).

In addition, all plaintiffs complain of the large signature requirements of §6831 and the short time to meet them afforded by §6833.

Plaintiff-intervenor Frommhagen alleges his age qualification, his change of registration from Republican to Democrat in 1969 and from Democrat to "Decline to State" in March 1972.

The other five plaintiffs in intervention joining Frommhagen are all barred, contrary to their wishes, from signing Independent nomination papers for Frommhagen as registered members of either the Republican or Democratic party, by virtue of §6830(c).

In *Hall,* plaintiff alleges membership in the Communist Party of the United States, which has not qualified under the requirements of §6430; as mentioned above, he seeks to be a candidate for President of the United States and is otherwise allegedly qualified for the office, but can do so only under the Independent nomination procedure. Like allegations are made as to plaintiff Tyner, who seeks the Vice Presidency. Plaintiff Wilkinson is registered as a Democrat; plaintiff Lima is a registered Communist; and plaintiffs Lopez and Graham are registered as affiliated with La Raza Unida Party.

The plaintiffs in *Hall* advance virtually the same objections as are advanced in *Storer*: the signature requirements of §6831, the short time periods afforded by §§6833 and 6864 and the qualification of signers provided by §6830(c). For obvious reasons, they do

not attack the prohibition on candidacy made by §6830(d), since the proposed candidates are not members of a qualified political party.

California affords candidates at least four paths to partisan office; while some may be smoother than others, they are nevertheless open: (1) obtaining the nomination of one of the established parties in a regular direct party primary (Division 5, Chapters 1 and 2); (2) the formation and qualification of a new party and obtaining its nomination (§6430), the requirements for which were upheld in *Christian Nationalist Party v. Jordan,* 49 C.2d 448 (1957); *Socialist Party, U.S.A. v. Jordan,* 49 C.2d 864 (1957), *certiorari denied,* 356 U.S. 952 (1957); (3) the Independent nomination procedure here involved; (4) the write-in procedure afforded in both the primary and general elections by §§10213, 10228, 10292, 10317, and 14412.

It cannot be said, in view of the foregoing, that any individual wishing to pursue a political career lacks ample opportunity to do so nor that individual voters are not afforded an adequate opportunity to vote for candidates of their choice. While a state may not create a situation in which parties are *de facto* restricted to the old established parties, Republican and Democratic, *Williams v. Rhodes,* 393 U.S. 23 (1968), this is certainly not true in California; we are advised without dispute that at present four parties enjoy official recognition on the California ballot. Thus, the basic freedoms guaranteed by the First and Fourteenth Amendments and invoked by plain-

tiffs here are satisfied. *Jennes v. Fortson,* 403 U.S. 431 (1971).

Legislatures of the respective states have broad powers, granted by Article I, Section 4 and Article II, Section 1 of the Constitution itself, to regulate the conduct of elections for Senators and Representatives and for electors for President and Vice President. While such power is not unlimited, *Williams v. Rhodes, supra; N.A.A.C.P. v. Button,* 371 U.S. 415 (1963), restrictions upon candidacy are subject only to a showing of legitimate state interest reasonably carried out.

The California statutes in question here are obviously designed to make it difficult to create, if not in fact to prevent, the confusion which would result from the unfettered ability of candidates and voters to skip freely from one party affiliation to another or to disavow previous party affiliations on short notice and strike out on their own as plaintiffs seek to do here. The prevention of such confusion is a legitimate objective. *Bendinger v. Ogilvie,* 335 F. Supp. 572 (N.D.Ill. 1971, three-judge court). There is no Constitutional prohibition, therefore, against legislation which, to this end, imposes more onerous requirements upon candidates and voters seeking to engage in "party hopping". *Jackson v. Ogilvie,* 325 F.Supp. 864 (N.D.Ill. 1971, three-judge court, one judge dissenting), *affirmed,* 403 U.S. 925 (1971).

Inasmuch as the foregoing principles are well-settled and the special requirements for Independent

nomination in California attacked in these cases fall well within them, plaintiffs have failed to state a claim upon which relief can be granted. Requirements and restrictions closely similar to those here attacked have been upheld against attack on virtually the same grounds advanced here. Cf. *Bendinger v. Ogilvie, supra,* (disqualification of candidates affiliated with another party within prior two years—compare §6830(c), (d) *Jackson v. Ogilvie, supra,* (disqualification as signers of nomination papers of those voting in preceding primary—compare §6830(c)); *Moore v. Board of Electors,* 319 F.Supp. 437 (D.D.C. 1970, three-judge court) (additional signatures and more limited time periods for Independent candidates —compare §§6831 and 6833).

The long and short of it is that the California Legislature, like those of many if not most states, has determined that the orderly functioning of the electoral process is best served by promoting party loyalty to one of a reasonable number of qualified parties with which the candidate or voter has established and maintained his affiliation for a reasonable period of time and, as said above, to discourage the confusion necessarily attendant upon a proliferation of candidates and a "laundry list" ballot.[2] These ob-

[2]A reasonable argument can be made that as a result of the number of qualified parties, the large number of special quasi-municipal districts authorized by law and requiring voter approval for certain types of action, all taken together with the California-adopted Populist practices of initiative, referendum and recall, the California ballot is already far too long for the average intelligent voter to cope with; this Court would be most loath to lengthen it, as is the Legislature.

jectives are clearly permissible under the First and Fourteenth Amendments, and the requirements here attacked do not transcend the permissible means of achieving such objectives.

For the foregoing reasons, the defendants' motions to dismiss in each of the above cases are granted and the complaints and actions are dismissed.

Dated, September 8, 1972.

/s/ O. D. Hamlin,
Senior United States Circuit Judge.

Robert H. Schnacke,
United States District Judge.

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[3]Hon. William G. East, Senior United States District Judge, the third member of the Court, has indicated his concurrence in the preceding Opinion and Order, although prevented by official duties elsewhere from affixing his signature.

Appendix B

California Elections Code—Nominations

—Chapter 3—

Independent Nominations

§6830. *Contents*

"Each candidate or group of candidates shall file a nomination paper which shall contain:

(a) The name and residence address of each candidate, including the name of the county in which he resides.

(b) A designation of the office for which the candidate or group seeks nomination.

(c) A statement that the candidate and each signer of his nomination paper did not vote at the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper. The statement required in this subdivision shall be omitted when no candidate was nominated for the office at the preceding primary election.

(d) A statement that the candidate is not, and was not at any time during the one year preceding the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper, registered as affiliated with a political party qualified under the provisions of Section 6430. The statement required by this subdivision shall be omitted when no primary election was held to nominate candidates for the office to which the independent nomination paper is directed."

§6831. *Signatures required*

"Nomination papers shall be signed by voters of the area for which the candidate is to be nominated, not less in number than 5 percent nor more than 6 percent of the entire vote cast in the area at the preceding general election. Nomination papers for Representative in Congress, State Senator or Assemblyman, to be voted for at a special election to fill a vacancy, shall be signed by voters in the district not less in number than 500 or 1 percent of the entire vote cast in the area at the preceding general election, whichever is less, nor more than 1,000."

§6833. *Time for filing, circulation and signing; verification*

"Nomination papers required to be filed with the Secretary of State or with the county clerk shall be filed not more than 79 nor less than 54 days before the day of the election, but shall be prepared, circulated, signed, verified and left with the county clerk for examination, or for examination and filing, no earlier than 84 days before the election and no later than 5 p.m. 60 days before the election. If the total number of signatures submitted to a county clerk for an office entirely within that county does not equal the number of signatures needed to qualify the candidate, the county clerk shall declare the petition void and is not required to verify the signatures. If the district falls within two or more counties, the county clerk shall within two working days report in writing to the Secretary of State the total number of signatures

filed. If the Secretary of State finds that the total number of signatures filed in the district or state is less than the minimum number required to qualify the candidate he shall within one working day notify in writing the counties involved that they need not verify the signatures."

§6864. *Time for obtaining signatures*

"Verification deputies appointed to obtain signatures to the nomination paper of any candidate may, at any time not more than 84 nor less than 59 days prior to the election, obtain signatures to the nomination paper of the candidate."

PARTY CANDIDATES

§6430. *Qualified parties*

"A party is qualified to participate in any primary election:

(a) If at the last preceding gubernatorial election there was polled for any one of its candidates who was the candidate of that party only for any office voted on throughout the State, at least 2 percent of the entire vote of the State; or

(b) If at the last preceding gubernatorial election there was polled for any one of its candidates who, upon the date of that election, as shown by the affidavits of registration of voters in the county of his residence, was affiliated with that party and was the joint candidate of that party and any other party for any office voted on throughout the State, at least 6 percent of the entire vote of the State; or

(c) If on or before the 135th day before any primary election, it appears to the Secretary of State, as a result of examining and totaling the statement of voters and their political affiliations transmitted to him by the county clerks, that voters equal in number to at least 1 percent of the entire vote of the State at the last preceding gubernatorial election have declared their intention to affiliate with that party; or

(d) If on or before the 135th day before any primary election, there is filed with the Secretary of State a petition signed by voters, equal in number to at least 10 percent of the entire vote of the State at the last preceding gubernatorial election, declaring that they represent a proposed party, the name of which shall be stated in the petition, which proposed party those voters desire to have participate in that primary election. This petition shall be circulated, signed, verified and the signatures of the voters on it shall be certified to and transmitted to the Secretary of State by the county clerks substantially as provided for initiative petitions. Each page of the petition shall bear a caption in 18-point blackface type, which caption shall be the name of the proposed party followed by the words "Petition to participate in the primary election." No voters or organization of voters shall assume a party name or designation which is so similar to the name of an existing party as to mislead voters.

Whenever the registration of any party which qualified in the previous direct primary election falls

below one-fifteenth of 1 percent of the total state registration, that party shall not be qualified to participate in the primary election but shall be deemed to have been abandoned by the voters, since the expense of printing ballots and holding a primary election would be an unjustifiable expense and burden to the State for so small a group. The Secretary of State shall immediately remove the name of the party from any list, notice, ballot, or other publication containing the names of the parties qualified to participate in the primary election."

§6082. *Signatures on nomination papers*

"Nomination papers for candidates for delegates of any party should be signed by not less than one-half of 1 percent and not more than 2 percent of the vote constituting the basis of percentage."